United Nations AT/DEC/1154

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1154

Case No. 1124: HUSSAIN Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Mr. Julio Barboza, President; Mr. Spyridon Flogaitis; Ms. Jacqueline R. Scott;

Whereas, on 14 December 2001, Sehba Hussain, a former staff member of the United Nations Children's Fund (hereinafter referred to as UNICEF), filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 15 February 2002, the Applicant, after making the necessary corrections, again filed an Application containing pleas which read, in part, as follows:

"*PLEAS*

...

(c) UNICEF New York be directed to pay me for legal costs incurred. This amounts to approximately $50,000. Additionally, UNICEF New York be directed to pay me the losses incurred by my forced early separation in terms of loss of regular earnings as well as loss in pension benefits. Finally, UNICEF New York be directed to compensate me suitably for the psychological trauma, loss of faith amongst Government Officials, UNICEF colleagues and friends. ...

(d) [I be awarded any] other relief which the ... Tribunal deems reasonable in the circumstances of the case ...

(e) In the interest of justice, I may be given an opportunity of a personal hearing ...

(f) UNICEF New York be directed to issue a letter of censure to concerned persons ...

...

(h) The ... Tribunal is requested to specifically examine ... the report of the JAB ... for arriving at decisions which are correct in law. ..."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 30 June 2002 and periodically thereafter until 14 January 2003;

Whereas the Respondent filed his Answer on 10 January 2003;

Whereas the Applicant filed Written Observations on 10 Novemebnr 2003;

Whereas, on 15 November 2003, the Tribunal decided not to hold oral proceedings in the case;

Whereas the facts in the case are as follows:

The Applicant joined UNICEF on a fixed-term appointment as a Project Officer at the NPO level, in Lucknow, India, on 15 September 1981. On 6 August 1985, the Applicant resigned from the Lucknow Office in order to join the Thimphu Office/UNICEF in Bhutan, as a Programme Officer at the L-3 level. She advanced to the L-4 level, effective 1 September 1987. On 31 May 1988, the Applicant resigned from her post in Bhutan and, on 1 June 1988, transferred to New Delhi, India, as a Programme Officer, Health, where she reverted to the NPO level. She was granted a probationary appointment on 1 September 1989, and was reassigned to the Lucknow Office as Zone Representative on 1 January 1990. She received a permanent appointment on 1 March 1990. On 1 January 1992, her title was changed to Chief, Field Office, Lucknow. At the time of her separation on 31 March 1998, she held the position of State Representative (STAR) at the NO-D level in Lucknow, India.

Ad hoc Enquiry Panel

In May 1997, complaints were brought to the attention of the Applicant regarding her direct supervisee by the Assistant Director of the Department of Education of Uttar Pradesh. Apparently, it was found that in liquidating of certain accounts, monies were not used for the purpose intended. Following extensive correspondence on the issue, on 1 August 1997, the Special Representative, India Country Office (ICO), New Delhi, established an Ad hoc Enquiry Panel to investigate

thee following issues: (1) the complaint from the Assistant Director of the Department of Education, (2) certain allegations of "harassment" made by the supervisee against the Applicant, and (3) the issue of liquidation of advance accounts raised by the Applicant.

The Ad hoc Enquiry Panel found that the "workplace rift" between the Applicant and her supervisee had been long-standing and was deteriorating; that the work environment at Lucknow office was not optimal; and, that harassment, as defined in the dictionary, had taken place. On 27 August 1997, the Special Representative, ICO, forwarded the report of the Ad hoc Enquiry Panel to the Applicant for her comments, which she provided, early September 1997.

On 21 November 1997, the Special Representative, ICO, advised the Applicant that "[h]aving considered the [Ad hoc] Enquiry Report, your response and the Panel's review of your response and that of [the Applicant's supervisee], I have come to the conclusion that the report's findings and conclusions stand as they are except for the typological [sic] errors in regard to [the Applicant's supervisee]'s [performance evaluation report (PER)] ratings which I have accepted to be corrected ..." He concluded that: "As far as management is concerned we consider the case closed".

Swapping of post encumbered by the Applicant from NPO to IPO

On 22-23 May 1997, a meeting was held on the Programme Budget Review (PBR) for South Asia, in Bangkok, Thailand, with a view to strategic reorganization of the ICO. As a result, with the best interests of the India Country Programme in mind, the Special Representative, ICO, decided that the NO-D post in the Lucknow office, encumbered by the Applicant, would be swapped with the IPO post of Chief, Mumbai, which was vacant.

In August of 1997, the Special Representative met with the Applicant in Manessar to discuss the implications of the decision to internationalise the STAR post occupied by her. In the course of this meeting, he offered the Applicant an equivalent post at the NO-D level in New Delhi, which she declined. Moreover, the Applicant did not apply for any vacant posts at her own or higher level.

On 19 September 1997, the Chief of Personnel Services, ICO, informed the Applicant that the decision to internationalize her post would take effect as of January 1998, and that UNICEF Headquarters would be asked to advertise her post. He stated that: "As you have not expressed interest in serving in other posts in UNICEF India and have opted instead for separation from UNICEF on conversion/abolition of your post, the six-month notice period of your separation from UNICEF's service will take effect from 1 October 1997 [to expire] end of March 1998." He asked the Applicant to sign the lower portion of the letter to indicate her acceptance of the proposed terms of her separation (12 months' pay plus an additional 50%).

On 30 September 1997, the Applicant signed the lower portion of the aforementioned letter, stating that: "I, hereby, accept the above mutually agreed terms of my separation from UNICEF service which I will not contest". However, she included the following notation: "My acceptance may kindly be viewed against the context of my forwarding letter dated [30 September 1997] which reflects that the unilateral decision taken to internationalise my post is a clear divergence from the recommendation of the [Management Advisory Group] and the approval of the PBR at Bangkok under the chairmanship of the Regional Director, Regional Office for South Asia (ROSA) as communicated to all staff in UNICEF, India".

In a letter dated 21 October 1997 to the Deputy Executive Officer (Operations), UNICEF, the Applicant stated as follows: "[w]hile I have opted to separate voluntarily, I have done so in the interest of dignity and self-respect".

On 3 November 1997, the Chief of Personnel Services, ICO, replied to the Applicant's letter of 30 September 1997. He stated that he understood from the Special Representative that, in his private meeting with the Applicant in Manessar in August of 1997, she had been informed of his decision to convert the STAR post in Lucknow to international, in line with what was agreed upon at the May 1997 PBR meeting in Bangkok, and that the Special Representative had offered the Applicant the possibility to serve in another equivalent post at her level, which she declined in favour of pursuing other professional interests outside UNICEF. The Chief of Personnel Services, ICO also assured the Applicant that the conversion of her post to international had nothing to do with the Enquiry which took place at the Lucknow office.

On "2/4" December 1997, the Applicant wrote to the Executive Director, UNICEF, in order to request a review of (i) the conduct and report of the *Ad hoc* Enquiry Panel; and (ii) the conversion of her post from NPO to IPO.

On 5 December 1997, the Applicant appealed to the JAB for a suspension of action. On 15 January 1998, the Presiding Officer of the JAB notified the Applicant that her request for suspension of action had been rejected because: (1) the report of the Enquiry Panel had already been completed and submitted, and (2) the decision to convert the post at Lucknow had also been implemented.

On 16 March 1998, the Deputy Executive Officer (Operations), UNICEF, responded to the Applicant's request of "2/4" December for administrative review. She informed the Applicant that she supported the Special Representative's decision to accept the report of the *Ad Hoc* Enquiry Panel in its final form. With respect to the conversion of the Applicant's post, the Deputy Executive Officer confirmed and amplified what the Chief of Personnel Services, ICO, had stated in his letter of 3 November 1997. Accordingly, she emphasized that there was no connection between the investigation by the Enquiry Panel and the decision to swap posts: while the enquiry began in August 1997, the decision to swap posts had been discussed in May 1997.

On 30 March 1998, the Applicant lodged an appeal with the JAB. The JAB submitted its report on 11 June 2001. Its conclusions and recommendations read, in part, as follows:

> ***"Conclusions and recommendations***
>
> 52. ... [T]he Panel *unanimously agreed* that the Appellant had not been charged with misconduct, that her case never went beyond the phase of the preliminary investigation, and that there were no fundamental flaws in the conduct of the *Ad Hoc* Enquiry Panel. However, it also *unanimously agreed* that the finding of harassment and the adoption of that finding cast serious doubt about the managerial competence and moral integrity of the Appellant without giving her an effective forum or opportunity to defend her name, and that the improper closing of the matter caused injury to her morale and professional reputation. The Panel *unanimously recommends* that the Appellant be paid three months net base salary in compensation for the injury caused by the ICO Administration in the wake of the preliminary investigation. It also *unanimously recommends* that the UNICEF Administration issue a letter of commendation to certify the Appellant's long and devoted service.

> 53. Furthermore, the Panel *unanimously agreed* that there was no adequate evidence showing a linkage between the establishment of the *Ad Hoc* Enquiry Panel and the decision to swap the post encumbered by the Appellant from NPO to IPO. ..."

On 26 November 2001, the Under Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed her as follows:

> "While agreeing with all other findings and conclusions of the Board, the Secretary-General cannot accept the finding concerning the Enquiry Panel's use of the term 'harassment'. Contrary to the Board's finding that the term 'harassment' was used in a 'loose' manner, the Enquiry Panel took care to rely on the definition of that term in the Oxford Dictionary. Furthermore, it is difficult to reconcile the Board's conclusion that the term was used improperly with its earlier conclusion that the Enquiry Panel respected all requirements of due process and fairness. The Secretary-General considers that no cognisable right of yourself as a staff member was violated by the Enquiry Panel's use of that term, as defined, and no evidence has been presented in support of the finding that the use of that term was injurious to you. Accordingly, the Secretary-General has decided not to accept the Board's recommendation for compensation and to take no further action on your appeal. ..."

On 15 February 2002, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The *Ad hoc* Enquiry Panel in its establishment, composition and procedure violated the Charter, Staff Regulations and Staff Rules of the United Nations.

2. The *Ad hoc* Enquiry Panel was investigating allegations of harassment against the Applicant without affording her the protection set forth in Chapter 15 of the UNICEF Human Resources Manual Disciplinary Measures & Procedures. The Applicant was found guilty of misconduct, yet the relevant procedures as stipulated in the Staff Regulations and Staff Rules were not followed by UNICEF.

3. There was documented evidence to prove that the investigation by the *Ad hoc* Enquiry Panel and the decision to convert her post from NPO to IPO were inextricably linked in the sense that the whole exercise of enquiry was undertaken to ensure the Applicant's exit.

4. The Applicant's desire and intention to continue working for UNICEF were misrepresented. Her ouster was a basic denial of both Human Rights and staff rights.

Whereas the Respondent's principal contentions are:

1. The constitution and conduct of the *Ad hoc* Enquiry Panel were reasonable and fair.

2. The conversion of the Applicant's post from NPO to IPO was not linked to the *Ad hoc* Enquiry Panel or influenced by prejudicial factors.

3. The Applicant, and not the Respondent, bears the responsibility for her "post-less" situation.

4. The Notice served by the Chief, Personnel Services, ICO, was properly issued.

5. The Applicant's request for the award of costs is without merit.

The Tribunal, having deliberated from 23 October to 18 November 2003, now pronounces the following Judgement:

I. The Applicant joined UNICEF, India, in 1981 and following a number of promotions and reassignments became Chief, Field Office, Lucknow, India. At the time of separation from service on 31 March 1998, she was State Representative (STAR) at the NO-D level, in Lucknow.

II. The Applicant experienced problems in her office with regard to her direct supervisee. In particular, she received complaints about him from the Department of Education of Uttar Pradesh, regarding financial matters. The Applicant and her supervisee expressed diverging opinions on those matters, and the disagreement between them escalated to the point that the supervisee's second reporting officer in the supervisee's PER for the year 1996, felt obliged to recommend a detailed review at the duty station by an independent third party. In a memorandum dated 1 August 1997 addressed to the Applicant, the Special Representative, ICO, announced the establishment of an Ad hoc Enquiry Panel to look into the case.

III. The Enquiry Panel prepared a draft report and requested the Applicant to present her comments. On 21 November 1997, the Special Representative, ICO, informed the Applicant that the final report was written taking into account her comments; that the draft report was substantially maintained; and, concluded that "as

far as management is concerned [they] consider the case closed". It is important to note that in that report, as accepted by the Administration, it was stated, inter alia, that the supervisor had harassed her supervisee, and that the Administration decided not to investigate the matter.

IV. In the meantime, another procedure affecting the Applicant's position in the Organization was going on, i.e. a reorganization exercise.

On 22-23 May 1997 the Programme Budget Review (PBR) was taking place in Bangkok, Thailand, where it was decided, inter alia, in line with an earlier PBR Committee decision that all state offices be headed by international professionals. On 10 June 1997, the Chief of Personnel Services, ICO, briefed the section chiefs via e-mail on the Bangkok meeting and informed them that the second phase of the proposed restructuring was to "implement the approved posts changes which will involve decisions on staff". The restructuring directly affected the post encumbered by the Applicant, as it was included among those posts that would be "internationalized".

In August 1997, the Applicant was offered an equivalent post at the NO-D level in New Delhi, which she declined. She also did not respond to the Administration's invitation to apply for any vacant post at her own or at a higher level. On 19 September 1997, she was informed that as she had not applied for any other post, she had opted for separation from service, which would indeed take effect after the six-month notice period, starting 1 October 1997 and expiring at the end of March 1998. She was asked to sign the lower portion of the letter, indicating that she accepted the proposed terms of separation, which she did.

Nevertheless, some time later, the Applicant asked for administrative review (i) of the decision of the Administration to accept the Enquiry Panel's report containing adverse conclusions and not to review the case in more detail, which eventually would clean her file from considerations that could harm her in her future professional goals, as well as (ii) of the decision to separate her from office. According to her, the Administration's decision to separate her from service was influenced by the findings in the Enquiry Panel's report against her.

In the proceedings that followed, the JAB unanimously concluded that there was no adequate evidence showing a linkage between the establishment of the Ad hoc Enquiry Panel and the decision to swap the post encumbered by the Applicant from NPO to IPO. On the other hand, it also unanimously agreed that the Administration did not give her any effective forum or opportunity to defend herself against a report

which was accepted by the Administration, and which concluded that she had committed harassment, and that by so doing the Administration caused injury to her morale and professional reputation. For that reason, the JAB recommended that she should be compensated by three months net base salary. The Secretary-General did not accept the recommendation made by the JAB.

V. The Tribunal does not agree with the Secretary-General. It is a well established principle of law, part of the wider principle of due process, that whoever is accused of any wrongdoing must be given a fair opportunity to defend him/herself within a proper procedure.

It is, of course, within the discretion of the Administration to institute ad hoc enquiry panels whenever it finds that it is necessary, as the Administration did in the present case. The Administration did not harm any legitimate interests of the Applicant, since the Enquiry Panel followed the proper procedures, and she was given a fair opportunity to express her views on the draft report.

It was nevertheless the responsibility of the Administration to either suppress that part of the report relating to the determination that she was guilty of harassment once it determined not to proceed, or to initiate a proper investigation, particularly when a staff member, as did the Applicant, requests that such an investigation be conducted. It is not within the power of a staff member to compel the Administration pursue disciplinary proceedings. Conversely, the Administration should only resort to administrative action (rather than disciplinary proceedings) when it does not prejudice or damage the position of staff and is not detrimental to staff. (See Judgement No. 877, *Abdulhadi* (1998).)

VI. In view of the above, the Tribunal concurs with the JAB's findings with regard to the Enquiry Panel's report, as it does with its other conclusion that there is no evidence that the Applicant's separation from office was the result of the conclusions of the Enquiry Panel's report. In fact, the Tribunal notes that the Applicant had agreed in writing to her separation from service. On the other hand, the Tribunal finds that the compensation proposed by the JAB was inadequate protection for the Applicant's interests. The only way to redress her complaint would be to remove that portion of the report that refers to harassment.

VII. In view of the foregoing, the Tribunal:

1. Orders the Respondent to remove from the Enquiry Panel's report any reference to or inference of harassment;
2. Orders the Respondent to pay the Applicant three months net base salary at the rate in effect at the date of the Judgement as compensation for the injury suffered; and,
3. Rejects all other pleas.

(*Signatures*)

Julio **Barboza**
President

Spyridon **Flogaitis**
Member

Jacqueline R. **Scott**
Member

New York, 18 November 2003

Maritza **Struyvenberg**
Executive Secretary